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IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. RT-0000F-02-0271 AT&T'S COMMENTS ON MONETARY AND NON-MONETARY DAMAGES

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively, "AT&T") hereby submit these Comments on monetary and non-monetary damages that should be imposed on Qwest Corporation ("Qwest") as a result of Qwest's failure to timely file certain interconnection agreements for Commission approval pursuant to Section 252(e) of the Telecommunications Act of 1996 ("Act").

I. INTRODUCTION

In this phase of the proceeding, the Commission has invited comment on a number of critical issues, the resolution of which will likely reshape the telecommunications industry in Arizona for years to come. AT&T is fully cognizant of the breadth and depth of these issues and the impact which this case will have on consumers, as well as on the industry itself. Central among the goals which AT&T

perceives as important here is a reorientation of the incentives which currently drive the behavior of the incumbent local exchange company, Qwest. Briefly, Qwest's behavior must change. And if the Commission is not able to achieve a significant reorientation of the incentives driving Qwest's behavior, then the result will certainly be detrimental to competition, to consumers and the remainder of the industry. Under the current legal and regulatory arrangement, Qwest clearly can engage in anticompetitive behavior. The central question then becomes how to change Qwest's behavior. This in turn presents a dilemma.

There is a serious question as to whether monetary fines provide sufficient incentive to Qwest to change its behavior, or whether fines imposed upon Qwest become merely another cost of doing business. The potential for new revenue to Qwest, if and when the Company is allowed to provide in-region, interLATA long distance service, is significant. The specter of having to pay fines of even several million dollars quite simply pales in comparison to the revenue potential here. Thus, the disincentive afforded Qwest by the threat of monetary penalties, by itself, is clearly inadequate to effect any behavioral change in Qwest's management.

Qwest's anticompetitive conduct and attitude must be viewed in light of Qwest's inherent conflict of interest. Presently, Qwest has two contradictory roles: a) as the operator of the local telephone network that virtually all competitive local exchange carriers ("CLECs") rely upon (in some form or fashion) to provide local telephone service; and b) as the principal competitor of those same CLECs in the very same retail markets. The last five years have shown that whatever incentive Qwest has to fulfill its legal obligations to open its network, it has a stronger incentive to preserve its local monopoly and prevent its competitors from succeeding in capturing local market share. Because it controls the facilities necessary for competitors to provide services, Qwest has both the ability to discriminate in favor of its own retail services by charging anticompetitive rates for access to those facilities and by providing those facilities in a discriminatory fashion.

These two factors—the huge revenue opportunity that exists for Qwest, coupled with the inherent conflict of interest between Qwest's wholesale and retail operations—mean that a single approach to the question of remedies may not be adequate in this case. For this reason, AT&T respectfully recommends that the Commission undertake a combination of actions here, focusing on three broad areas of concern: a) a reorientation of incentives, to assure future compliance, b) penalties for past offenses, and c) restitution in the form of allowing opt-in to all the discriminatory agreements which are the subject matter of this action, whether or not the terms of the agreements remain in effect. It is only through a combination of actions that the Commission can be assured that Qwest will actually respond in a positive manner to the order of this Commission.

AT&T recommends that the Commission undertake a four-pronged approach to the remedies phase of this case. The first prong would entail the initiation of a show cause proceeding, requiring Qwest to bear the burden of demonstrating why the Commission should not either revoke Qwest's certificate or require the structural separation of Qwest's wholesale and retail operations. Alternatively, the Commission could initiate a show cause proceeding to draft a code of conduct for Qwest that would apply to Qwest's relationships with the CLECs and its retail operations. The second prong consists of the imposition of maximum fines allowable under law. AT&T believes that the money received into the general fund might be earmarked to create a fund for the encouragement of competitive entry within the state. The third prong consists of postponing any recommendation in the Section 271 proceeding until the section 252 proceeding is complete. And the fourth prong consists of making all of the agreements which are the subject matter of this case, including those which Qwest has terminated, available to CLECs by allowing them to opt-in to those agreements for a period of time equal to the original term of each of the contracts.

Each of these separate prongs has its own role in seeking to modify Qwest's behavior. There is considerable doubt that any one or two of these approaches, standing alone, would be sufficient. AT&T thus believes that all four prongs should be implemented in a unified fashion.

II. THE COMMISSION SHOULD REQUIRE STRUCTURAL SEPARATION OF QWEST'S WHOLESALE AND RETAIL OPERATIONS

A. Structural Separations

As AT&T has noted *supra*, Qwest has a fundamental conflict of interest between its wholesale and retail operations. Essentially, Qwest operates as both a supplier and competitor to the new entrants. It is obligated to provide new entrants with essential facilities, without which those new entrants cannot compete, and it also is a direct competitor to those new entrants and, therefore, has every incentive to prevent those new entrants from gaining new customers.

Some may argue that Qwest receives revenue from both its retail and its wholesale operations and should want to maximize both. The problem, however, is that so long as Qwest believes it will receive less revenue per customer for its wholesale services than for its retail services, there is really no basis to conclude that a monopoly provider will improve its overall relations and dealings with its competitors. Therefore, at least in Qwest's view, the way to maximize revenue is to ignore wholesale services, and wholesale customers, and do everything possible to retain retail market share.

The solution is to make the existing network available to new entrants on the same terms that Qwest uses it itself. In short, the Commission should take action to eliminate Qwest's conflict of interest by establishing a corporate structure for Qwest that would separate retail and wholesale activities into two separate subsidiaries. Specifically, AT&T advocates the establishment of a separate Qwest retail company with independent management that would interact with a Qwest wholesale company on the same arm's length basis as any other CLEC.

Structural separation, properly done, would ensure that transactions on the wholesale side become more visible to regulators, as well as competitors. These separate affiliates would, for example, maintain separate books, records, accounts, and facilities. The wholesale affiliate's incentive would be to focus attention on its customers, the CLECs; and the retail affiliate would focus on its own end-user customers.

Currently, Qwest has a clear incentive to charge competitors the highest rates it can for unbundled network elements ("UNEs") or access because, no matter what it charges others, it pays only the actual economic cost of using its network.[1] However, if Qwest were structurally separated, the retail arm would have to pay the same price for UNEs as CLECs and, therefore, would have a cost basis for its service more closely

[1] *See Bell Atlantic-GTE Merger Order* ¶ 166, ("[T]he incumbent LEC may profit from imposing high loop charges, or access charges, on both its affiliates and its competitors, because the charges to its affiliates constitute only an internal transfer.")

comparable to a CLEC's cost structure.[2] For the first time, Qwest would have some incentive to moderate its UNE and access rates so that its own retail arm could effectively compete. That change of incentive is exactly what is needed to remedy the current problem of anticompetitive conduct and attitude.

The costs associated with implementing structural separation do not appear unreasonable. Section 272 of the federal Act requires that Qwest create a new subsidiary for the provision of long distance service, and Qwest complied. Qwest did not complain about the costs associated with the creation of that new subsidiary, nor did it speculate about the potential for lost jobs, or the elimination of revenues, or threats to retirees' pensions. Qwest just did it.

Imposition of structural separation will contribute directly to the development and spread of competition within the State and is a logical solution to many of the problems currently being encountered by new entrants. AT&T strongly urges the Commission to consider and implement a structural separation approach as a remedy in this proceeding.

Procedurally, AT&T believes that the way to approach structural separation is by way of a show cause proceeding in which Qwest would be given the burden of showing why the Commission should not revoke its certificate of authority. In the event Qwest were unable to show cause for the retention of its certificate, it could, as part of a settlement, agree to a structural separation, under terms and conditions to be set by the Commission after notice and hearing. On the other hand, in the event Qwest were unable to show cause for the retention of its certificate and was unwilling to agree to a structural

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[2] Some may argue that a mere transfer of dollars between affiliates would not effectively change the incentives for the Company as a whole and, accordingly, a complete divestiture is necessary. AT&T views structural separation as a middle ground. In the event structural separation does not alter Qwest's behavior, then further separation in the form of full divestiture may become necessary and appropriate at that time.

separation requirement, then the Commission would revoke Qwest's authority and require Qwest to sell its Arizona operations to a new owner within a specific period of time.

The important thing here is that the Commission take action to change Qwest's conduct. A structural separation requirement will serve to change Qwest's behavior by changing the underlying incentives which drive that behavior. At the same time, however, structural separation should not be viewed as punitive. Although it will change the way Qwest does business in the future, and will change the incentives for Qwest to act in accordance with the law, it does not provide a punishment of any kind. In order to punish Qwest for its past misconduct, further action is necessary and appropriate.

B. Code of Conduct

Qwest dealings with CLECs demonstrate that Qwest has dealt with CLECs on an *ad hoc* and discriminatory basis. Qwest has demonstrated a corporate culture that is not conducive to competition in Arizona. As discussed *supra,* the fundamental issue regards Qwest's conduct while doing business with its competitors and its own retail operations. The issue is extremely relevant when one considers Qwest's dominant, monopoly status as both retail and wholesale provider of services. An alternative solution or remedy is the imposition of a code of conduct that Qwest must abide by in its dealing with other telecommunications carriers and its retail operations.[3]

Based on a finding of anticompetitive conduct, the Indiana Utility Regulatory Commission recently ordered Ameritech Illinois to file a Code of Conduct to be

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[3] A code of conduct is a less desirable solution than structural separations. This is why AT&T recommends structural separations. However, if the Commission adopts a code of conduct in lieu of structural separations, it must monitor Qwest's conduct to assure compliance with the code. Repeated failure to comply with the code of conduct will necessitate implementing more effective measures, such as structural separations.

commented on by the parties and reviewed by the Commission.[4] Other state commissions have also ordered or adopted codes of conduct.[5] As an alternative to structural separations, the Arizona Commission could open a separate proceeding and require Qwest to submit a code of conduct for Commission review and approval.

III. THE COMMISSION SHOULD IMPOSE FINES UPON QWEST IN THE MAXIMUM AMOUNT ALLOWABLE UNDER LAW

The Staff Report and Recommendation dated June 7, 2002, goes into considerable detail analyzing the appropriateness of fines and other penalties. Staff initially found that 25 agreements should have been filed with the Commission for approval pursuant to Section 252(e). Staff Report and Recommendation at 17-18. Staff recommended fines in the amount of $3000.00 per agreement.[6] *Id.* at 19. Staff recommended less than the statutory maximum of $5000.00 per violation permitted by Article 15, Section 16 of the Arizona Constitution and A.R.S. § 40-424 "[b]ecause Staff cannot rule out the possibility that Qwest's failure to file the agreements was due to good faith differences in interpretation ..." *Id.*

AT&T believes the evidence will show that the reason Qwest did not file the agreements had less to do with "good faith differences in interpretation" and more to do with not wanting to make some of the agreements available to other CLECs. If the evidence shows willfulness, AT&T will recommend that the maximum fine of $5000.00 be imposed per violation.[7]

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[4] *In the Matter of the Complaint of Comtel et.al v. Indiana Bell Telephone Company d/b/a Ameritech Indiana,* Cause No. 41998, Interim Order (Ind. Util. Reg. Comm. Dec. 26, 2002)

[5] The Pennsylvania, Vermont and Texas Commissions have implemented or are implementing codes of conduct.

[6] At page 19, Staff states there are 23 agreements that fall into Category 1, or agreements that should have been filed.

[7] Qwest has already agreed to pay the fines recommended by Staff. TR7 (June 19, 2002).

On August 14, 2002, Staff released the Supplemental Staff Report and Recommendation. Staff revised its list of Category 1 agreements. *See* Exhibit G. The new list contains 28 agreements.

AT&T intends to review Staff's list and the remaining agreements and, if legally justified based on Staff's Report and the Federal Communications Commission's order, recommend that additional agreements be added to the list and be subject to the maximum fines permitted by law.

Additionally, while AT&T recognizes that under current law any fine imposed would go directly into the State's general fund, AT&T would suggest that there is time, between now and the opening session of the Legislature, to develop a plan for the use of any funds generated as a result of this particular case.

AT&T believes that, as part of the restitution process, it is appropriate to provide some kind of additional incentive to companies who actually enter the Arizona local market. The goal would be to create a new, additional incentive for the type of competition that Qwest's illegal actions sought to foreclose. In this context, perhaps the Commission could support a legislative initiative awarding a specific dollar amount, payable to a new entrant or even directly to the customer for each residential customer who signs up for local exchange service with the new entrant, until the total amount of the fine has been completely distributed. In this context it might be necessary to place certain restrictions on the award. For example, the award should be limited to those customers who actually subscribe to and receive local service from a new entrant for a specified time period, perhaps one year. It would similarly not be appropriate to grant an award to a customer who had merely gone from one CLEC to another. Any award should of course be payable by the State, either from the general fund or from some separate and newly created fund, and not from Qwest.

The important thing is that there is some time, albeit limited, between now and the beginning of the legislative session, to develop and implement a plan for the use of these funds. The imposition of the fine on Qwest, however, is completely unrelated to the question of how the resulting funds are to be used. Current statutory restrictions clearly do not provide the kind of flexibility that would be desirable in this case, and so the development of a plan between now and the end of January, acceptable to the Legislature, would provide a solution to the difficult question of how to use the money which could be generated as the result of the imposition of a fine in this case.

IV. THE COMMISSION SHOULD POSTPONE ANY DECISION RELATING TO QWEST'S SECTION 271 APPLICATION PENDING FURTHER INVESTIGATION

The third prong of AT&T's proposal involves the postponement of any recommendation relating to Qwest's section 271 application. The ALJ recently determined on reconsideration that the Section 271 process need not be held up until the Section 252(e) proceeding is completed, and the two proceedings can proceed independently. Procedural Order dated December 20, 2002, at 3. Disregarding the procedural aspects of the ruling, postponing a recommendation in the Section 271 proceeding would ensure that Qwest does not gain the benefit of its illegal bargains, and would serve as a non-monetary penalty.[8]

Qwest's negotiation and concealment of these unfiled agreements undermined the Section 271 process in a number of ways. In at least two instances, Qwest bargained for

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[8] AT&T is not suggesting that the remaining work that needs to be done in the Section 271 proceeding be postponed. The remaining issues can be disposed of. AT&T is recommending that the Commission postpone its overall recommendation until the Section 252(e) case is complete.

and received a promise from its competitors Eschelon and McLeod to be silent and refrain from opposing Qwest's Section 271 applications in all fourteen states. In each of these agreements, Qwest promised preferential treatment to the competitor. Not only did Qwest discriminate against its other competitors, it also silenced two of its most important critics in the very proceeding intended to open the local market to all competitors. Qwest's actions here delayed the Commission from hearing evidence from a group of potential witnesses who quite clearly had material information.

The whole purpose of the collaborative process was to ensure that all parties could benefit from the dialogue which was to occur. The intent of the collaborative approach was to engage in an open dialogue and to work out interconnection issues publicly. However, with respect to the Eschelon and McLeod agreements, we have a situation in which Qwest, in the midst of this purportedly collaborative process, engineered separate, private deals for two CLECs. Qwest promised to focus on the needs of these CLECs, privately and apart from the public collaboration; and, in exchange, the CLECs promised to remain silent during the "collaborative" process.

In other words, while Qwest was collaborating with some CLECs publicly, it was also being *more* collaborative with others privately. Other CLECs did not benefit from whatever dialogue might have occurred between and among Eschelon, McLeod, and Qwest with respect to these CLECs' interconnection needs. The other CLECs and the Commission itself were shut out of that dialogue. Clearly, the creation of private, side-agreements, as here, did not promote the overall collaboration which was supposed to occur, but instead undermined it.

Under these circumstances, the entire Section 271 process has been compromised in two distinct ways: first, at least two of Qwest's critics were artificially kept out of those proceedings, detracting from the quality of the public dialogue; and, secondly, the group that did participate in the collaborative process did not receive the benefit of the dialogue which evidently took place between and among Qwest, Eschelon, and McLeod, and the remaining parties continued to expend money and resources to collaborate on issues settled with other CLECs.

By postponing any decision on Qwest's Section 271 application until the Section 252(e) investigation is complete, the Commission can use the evidence, findings and conclusions arrived at in the Section 252(e) proceeding in the public interest portion of the Section 271 proceeding. But more importantly, postponing a recommendation on Qwest's Section 271 application serves as a non-monetary penalty to Qwest for the inappropriate conduct that is directly related to, and that impacted, the Commission's Section 271 investigation.

AT&T therefore respectfully recommends that the Commission postpone any recommendation relating to Qwest's Section 271 application pending the conclusion of the Section 252(e) investigation.

V. OPT-IN

As mentioned at the outset of these Comments, AT&T believes that opt-in is necessary and appropriate as an additional non-monetary remedy. Qwest should be required to allow CLECs to opt-in to each and every one of the unfiled agreements consistent with the Act and FCC rules. This is the fourth prong of AT&T's recommendation in this matter.

The only way to cure the discrimination which has occurred here is to open the secret agreements to "pick and choose" under the Act, in a manner which provides the greatest flexibility to new entrants, and makes the terms and conditions of those agreements as useful as possible. This means that opt-in should be allowed with respect to each provision and should not be unfairly hindered by any arbitrary rules created by Qwest to exclude certain CLECs from being able to utilize favorable terms and conditions. Also, the time period for opt-in should begin on an announced date certain, and extend for the same period as the original term of the contract. If no term is stated in the original contract, then Qwest should be required to allow opt-in for a reasonable period to be determined by the Commission. In this context, the fact that Qwest may have terminated one or more of these agreements should not act to shorten in any manner the availability of the opt-in for other carriers. This would allow the CLECs to pick and choose, for example, the 10% discount provisions granted to Eschelon and McLeod, for the same period of time the discount was available to the CLECs.

VII. CONCLUSION

AT&T believes this is a watershed moment for competition in the State of Arizona. Decisions made in this case will dramatically affect the way telecommunications services are delivered or not delivered in this State for years to come. It is vital that Qwest's local market be truly open to new entrants if consumers are to benefit from the new services and lower prices promised by competition. If that is going to happen, Qwest's behavior must change.

AT&T believes that the way to change that behavior is by way of a four-prong approach: First of all, the Commission should provide for structural separation, or for revocation of Qwest's certificate of authority, in a show-cause proceeding. This will change the incentives driving Qwest's behavior and align that behavior with the policy goal of introducing competition in the State. However, such structural separation is not in any way punitive. It is intended to change Qwest's behavior on a going-forward basis, and does not provide either punishment or restitution for past behavior. Alternatively, the Commission can draft and impose a code of conduct on Qwest to ensure legal, fair and nondiscriminatory dealings with its wholesale and retail customers. Secondly, the Commission should impose fines on Qwest in an amount equal to the maximum allowable under law. This will punish Qwest's past misconduct. Third, the Commission should postpone any recommendation on Qwest's Section 271 application, pending further investigation. This is intended to preserve the integrity of the Commission's procedures and cure the damage caused by Qwest's misconduct. Fourth, CLECs must be permitted to opt-in to the terminated agreements.

It is imperative that the Commission implement a multilateral solution to the complex problem before it, namely, how to change the behavior of a large, entrenched monopoly. These four prongs, working together, stand a much better chance of successfully changing Qwest's behavior than would any one approach by itself.

Respectfully submitted this 20th day of January, 2003.

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CERTIFICATE OF SERVICE
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